IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. (A)

LARRY GRANT LONCHAR,

Petitioner-"Appellee"

-Vs-

WALTER ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent-"Appellant"

REPLY IN OPPOSITION TO RESPONDENT-"APPELLANT'S" CHALLENGE TO STAY ENTERED BY JUDGE CAMP

Petitioner, Larry Grant Lonchar, by his undersigned counsel, believing that his case has merit and raises substantial constitutional questions, hereby opposes the application to vacate the stay entered by Judge Camp that was entered at 9:48 p.m., on June 29, 1995.

I. WHILE THE WARDEN HAS FILED A "NOTICE OF APPEAL" THE ISSUES BEFORE THE LOWER COURT ARE NOT APPEALABLE

The Warden, while he is referred to as "Appellant",[1] is askin[illegible]his Court to vacate the stay of execution entered by Judge

[1] The inverted commas are used since, although he has filed a "Notice of Appeal," Warden Thomas may not legitimately bring an appeal to this Court. The only jurisdictional basis for seeking relief from the lower court ruling at this juncture is through a motion to vacate the stay of execution.

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Camp after the hearing held yesterday afternoon. It is clear that this Court does not have jurisdiction to entertain an appeal, as such, and that the Warden's application may only be entertained as a motion to vacate the stay.

Jurisdiction

The District Court's Order denying the state's motion to dismiss on abuse of writ grounds does not constitute an appealable "final" order, and this Court cannot consider the Warden's notice of appeal for lack of jurisdiction. See *F.R.A.P. 3 & 5; 28 U.S.C. §§ 1291 & 1292(b)*. Pursuant to *28 U.S.C. § 1291*, only "final decisions" of the district court may be appealed to the Court of Appeals. "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945). In this case, the District Court's order denying the state's motion to dismiss *begins* the litigation of the merits of this case in federal court.

Instead, the denial of the motion to dismiss on abuse of writ grounds is an issue suitable only for interlocutory appeal, which may not be granted in the absence of a statement from the District Court under *28 U.S.C. § 1292(b)*. No such statement has been sought by Respondent or conferred by the District Court, and the District Court has effectively acknowledged that there is no "substantial ground for difference of opinion," *28 U.S.C. § 1292(b)*, since neither the Court nor counsel have found a case where abuse of writ has been applied to a dismiss a first federal habeas petition.

II. THE ONLY ISSUE PROPERLY BEFORE THIS COURT IS THE PATENT PROPRIETY OF JUDGE CAMP'S STAY ORDER

The only question before this Court is whether a stay is appropriate. Because of the obviously drastic results of the denial of a stay, and the relatively insignificant prejudice to the State when a stay is granted, the burden now rests upon the Warden to "demonstrate that the issues [presented in the petition] are [not] debatable among jurists of reason," or that the issues presented "are [not] 'adequate to deserve encouragement to proceed further.'" Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983) (citations omitted).

The Warden has simply cited no case that comes close to suggesting that Mr. Lonchar should be denied a stay. The "novel" rule of habeas corpus litigation proposed by the Warden essentially asks this Court to spontaneously and judicially create a bar to habeas corpus relief that goes far beyond Rules 9(a) and 9(b) to the Rules Governing Habeas Corpus Actions. This bar would be one that has no precedent in the law, and that was never announced to Larry Lonchar as a litigant to give him fair notice of the hidden barrier reef that might sink his entirely legal ship.

The record indicates that Larry Lonchar has been told by State Court Judge Connelly, by Federal District Judge Camp, by counsel and--periodically--by counsel for the Warden[2] that relief would be

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[2] Counsel for the Warden seemed to shift another position yesterday announcing that no such assurance had been made with respect to federal court. However, in state court counsel announced that there had been no "specific waiver on the record in any particular proceeding." (6/23/95 Hrg. at 21) (emphasis supplied) To the extent that counsel now argues that there was

available should he elect to proceed with his appeals. It would be fundamentally inequitable to create a novel rule now in the heat of the moment that would result in the execution of Larry Lonchar within hours.

A. THERE HAS BEEN NO DISCUSSION OF RULE 9(A), NOW THE WARDEN DENIES RELIANCE ON RULE 9(B), AND THE STATE HAS CITED NO CASE THAT PROVIDES A BAR TO FEDERAL HABEAS CORPUS RELIEF BEYOND THESE TWO PROVISIONS

There have been some shifting sands in the position taken by the Warden, as it has become apparent that each argument is without merit. It is true that all along the State has not relied on Rule 9(a) in arguing to vacate the stay.[3] Now, after recognizing that Rule 9(b) is also facially inapplicable,[4] the Warden has backed off this argument also.

We are now reduced solely to a novel proposition that there should be another judicial exception to the right to habeas corpus relief, based on the Warden's amorphous "principles of equity." See *Warden's Motion, at 9.* The Warden concedes "the unavailability of a case directly on point." *Id.* In fact, the Warden does not suggest a case peripherally on point, but cites only to cases that deal with Rule 9(b).

Not only have no jurists yet announced such a proposition, but any such "rule, it has been suggested, would risk violating the constitutional provision forbidding suspension of the writ except in times of war or rebellion." Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, at 702-03 (1994) (citing authorities); id. at 181 n.66 (quoting Alexander Hamilton); Aiken v. Spalding, 684 F.2d 632, 633 (9th Cir. 1982) ("[l]iberal construction [of Rule 9(a)] also avoids a confrontation with the Suspension Clause of Art. I, § 9, of the United States Constitution).

Certainly, there is no authority to vacate a stay under circumstances such as these.

B. THE WARDEN ASSERTS NO PREJUDICE FROM LARRY LONCHAR'S ACTIONS, AS IS CLEARLY BORNE OUT BY THE FACT THAT MR. LONCHAR HAS ENTERED FEDERAL COURT BEFORE ANY SIMILARLY-SITUATED GEORGIA DEATH ROW INMATE

Although he has now abandoned his Rule 9(b) arguments, the Warden seems to be arguing that Larry Lonchar achieved some "strategic or tactical advantage" by filing his federal habeas petition within minutes of the denial of his state proceedings. If this were true, Larry Lonchar would be an inadequate strategician, or a bad tactician.

Larry Lonchar's case was affirmed on direct appeal on July 13,

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such a waiver in federal court, counsel apparently refers to the prior federal proceedings where Judge Camp discussed the possibility of Mr. Lonchar's "waiv[ing] any appeals on [his] behalf in federal court or otherwise." (11/14/91 Hrg. at 437) (emphasis supplied) It would seem that this would, were it really a waiver, operate in both state and federal court. However, it would seem still clearer that there was no such waiver since Judge Camp went on to advise Mr. Lonchar that "you can change you mind up until the time, of course, sentence is executed, and bring a petition for habeas corpus." Id. at 443.

[3] It is important to note that the State has not even *attempted* to prove the requisite prejudice to meet the requirements of Rule 9(a) and that issue is simply not before the Court at this time. See *State's Motion to Dismiss, at 24* (requesting a hearing on prejudice if the question of Rule 9(a) is deemed to have any merit). For reasons set out below, it is clear that no such showing of prejudice could be made.

[4] The pleadings from the District Court have been lodged with this Court and Petitioner will not reiterate all of them. Suffice it to say that reasonable jurists could not differ that under current law Rule 9(b) has no application to this case.

1988. See Lonchar v. State, 258 Ga. 447, 369 S.E.2d 749 (1988), cert. denied, 488 U.S. 1019 (1989). There are a total of sixteen inmates on Georgia's Death Row whose death sentences were affirmed prior to that date, and who are not in federal court. There are a total of 36 inmates (one of whom has two death sentences from separate trials) on Georgia's Death Row who have had their death sentences affirmed on direct appeal since that date, and none is in federal court. It is clear, then, that Larry Lonchar's actions have not only failed to prejudice the State by delaying his litigation, but they have resulted in the most expeditious consideration of any person currently in Warden Thomas' custody.

It is very clear that Larry Lonchar has neither intended to secure such an advantage, nor has he in fact done so.

C. WHILE LARRY LONCHAR'S MOTIVATION IN FILING A FEDERAL PETITION IS NOT RELEVANT TO THIS DECISION, IT IS CLEARLY NOT THE CASE THAT HE ONLY INTENDS TO PURSUE THE CHANGE IN METHOD OF EXECUTION

The unrebutted testimony in the lower court was that Larry Lonchar had finally seen that his litigation could achieve broader purposes than to save his own life, so he had agreed to litigate all issues presented:

> Q. Let me ask you this, Mr. Lonchar. You, your attorneys, have filed a petition in court that contains 59 pages, and you signed the verification that you have personal knowledge of the allegations in the Petition for Writ of Habeas Corpus, and that they are true and correct, and that you seek the relief requested in there. Did you sign that verification, I assume?
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> A. Yes, Your Honor.
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> * * *

> Q. Now, I understand your point with regard to the question of the manner of execution so that you can donate your organs, that's the point you were making to me a moment ago; is that correct?
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> A. That's correct.
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> Q. Now, a great deal of the petition goes far beyond that, and alleging irregularities and violations of your rights that would affect both your sentence and conviction and your sentence of execution in a prior state court proceeding. It is your wish to pursue those claims through a petition for Federal Habeas Corpus Relief? Do you understand my question.
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> A. Yes, Your Honor. Personally, I have to agree that I have to pursue this position to follow on what I would like to do, so I would have to say to the Court that, yes, I do.

(F.H.T. at 18-19)

Judge Camp felt that Mr. Lonchar's major motivation behind his litigation was to use his case as a vehicle for systemic change, to abolish the Electric Chair and provide inmates on Death Row with an option to save other lives, if in fact their executions could not be averted. Judge Camp explicitly did not find, however, that this vitiated the good faith with which the rest of the petition was to be litigated.

While the Warden adverts to this in passing, it should be emphasized that Larry Lonchar's motives in litigating all the issues in his case are not relevant to what the outcome will actually be. On the face of the petition, it would probably be true to say that he has more chance of winning the challenge to his conviction than to change the method of execution.[5]

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[5] That is not to say, of course, that counsel's advice that pending litigation could precipitate political change would be false. However, clear precedent from this Court indicates that Mr.

It is true, but entirely irrelevant to the merits of the claims, that Larry Lonchar filed his 1990 state habeas petition to avoid his brother's suicide. (F.H.T. at 19) Now, one precipitant for Mr. Lonchar going along with his appeals is that he sees some chance that his litigation will help others, "all of these people's lives involved. . . ." (F.H.T. at 21) In another case, it might be that a petitioner believed that his mother would be happy at his pursuing his appeals. In another case, his motivation might be his desire to watch the N.B.A. finals for many years to come. These motives are simply not relevant to whether there is merit to the claims presented, and whether the claims may result in one type of relief (changing the method of execution) or another (vacatur of his convictions and sentences) is not relevant to the fact that such relief is being sought.

III. PETITIONER SHOULD SURELY HAVE THE OPPORTUNITY TO ADDRESS ANY NOVEL RULE BARRING RELIEF IN THE LOWER COURT

When the issue of abuse of the writ came up in Court yesterday, it had not been anticipated by Petitioner. After all, Rule 9(b) simply does not apply to the first petition filed in federal court by a Petitioner, as counsel had correctly advised Mr. Lonchar. It was not until counsel arrived in Court that counsel received the state's pleading raising abuse of the writ. As

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Lonchar will also, or alternatively, receive a new trial since he was not present for much of his first trial. This is a capital case and under the authority of "*Diaz* and *Hopt* . . . a capital defendant's right to presence is nonwaivable." Proffitt v. Wainwright, 685 F.2d 1227, 1258 (1982), modified on rehearing, 706 F.2d 311 (11th Cir. 1983); accord Hall v. Wainwright, 733 F.2d 766, 775 (11th Cir. 1984).

counsel said in the District Court, counsel was "not prepared to address it in depth." (F.H.T. at 24) However, counsel did claim Petitioner's right to an evidentiary hearing:

> But I would request that opportunity for an evidentiary hearing as I think the one thing the Potts case makes very clear . . . if the State has come forward with its burden of production, there has to be an opportunity for an evidentiary hearing if the record doesn't make it categorically clear on the face that there is not abuse.

(F.H.T. at 24) Counsel noted that he was "going to have to think this through more carefully than I've had the chance to do. . . ." (F.H.T. at 26)

It as hard enough to respond to Rule 9(b) in this fashion, but the Court required counsel to present such evidence as was available on the issue of abuse. With just twelve minutes to prepare, counsel noted that, "as far as the available testimony right here, I guess it's me." (F.H.T. at 43) This in fact took place, and was the extent of the evidence available on such short notice.[6]

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[6] Counsel made it clear that a proper hearing on Rule 9(b) should entail other evidence. Counsel stated that if they were available he would present "some other lawyers who have been involved in this case as to who the ones really have been who have prevented this coming to pass. . . ." (F.H.T. 27) This would show that "there would be something fundamental[ly] inequitable . . . to blame Larry Lonchar for the actions that were taken not only without his consent, but against his will [in] a next friend petition." (F.H.T. at 27) This and other evidence would show that Mr. Lonchar's "motivation hasn't been to abuse the writ to vex, harass and delay. His motivations have been very sincere." (F.H.T. at 29)

Counsel also noted that it would be important to explore the question of Larry Lonchar's mental state. (F.H.T. 43 et seq.) Counsel asked that "we be given the opportunity . . . to present other evidence, I would think including Dr. Herendeen and his experiences consulting with Larry over the last year and a half."

If it was difficult for Petitioner to respond to the novel Rule 9(b) argument in the lower court, Petitioner had no opportunity to present evidence on the amorphous notions of "equity" that the Warden seeks to advance in this Court today. There is obviously a great deal of evidence that would be relevant to this inquiry, including any prejudice to the Warden, whether the shifting sands of the Warden's positions would deprive him of the clean hands needed to assert this new rule, and so on and so forth.

The law is clear that Petitioner has the right to a reasonable time to prepare his defense against abuse, and a right to be heard on these matters. It is clear from Rule 9(b) itself that if the question of abuse is raised, "it is inherent in this obligation placed on petitioner [to respond to allegations of abuse] that he must be given an opportunity to make his explanation. . . ." *Advisory Notes to Rule 9(b)* (quoting Johnson v. Copinger, 420 F.2d 395, 399 (4th Cir. 1969)).

Indeed, since at least Vaughan v. Estelle, 671 F.2d 152 (5th Cir. 1982), it has been clear in this Circuit that "[t]he applicant is to be afforded a reasonable opportunity to traverse the suggestion of abuse." Id. at 153. In Vaughan the petitioner had never been given a hearing on abuse, but he had at least had time to pull

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(F.H.T. at 47) This would include how Petitioner's illness of manic depression has played into the alleged "manipulation" of the system.

Counsel also stated that the conditions at the prison--in particular the intolerable heat in summer--has been important to Larry Lonchar's periodic desire to die. (F.H.T. at 45) This is precisely the kind of evidence countenanced in Potts v. Zant, 638 F.2d 727, 749 (11th Cir. 1981). These and other factors would also be relevant to the State's novel argument made today.

together evidence, and since he had litigated a prior § 2254 case, he was on notice that abuse of the writ would be an issue.

In this case, it is clear that Petitioner had the right to notice of the Warden's "novel" argument in time for the hearing yesterday, and has the right to know what the argument really entails before he can be required to respond to it with evidence.

Even were this a case of abuse of the writ--and Rule 9(b) simply has no application--the Potts litigation is mighty precedent for a finding that Petitioner should be allowed to proceed in this case. On June 26, 1980, Judge O'Kelley dismissed the petition, finding Potts' prior statements in the next friend petition to "provide cumulative support for a finding that the writ of habeas corpus has been abused." Potts v. Zant, *Order at 8 (N.D. Ga. June 26, 1980)*. This Court reversed.

The Court also held that in arguing for the dismissal of fundamental constitutional claims, "the State's position would be particularly difficult where--as in the present case--a determination has not yet secured a determination on the merits of his claims." Potts v. Kemp, 764 F.2d 1369, 1371 (11th Cir. 1985). This showing was not made in Potts where the "evidence . . . did not establish that the petitioner acted with the intent to 'vex, harass and delay.'" Id. It is not clear quite what must be shown under the amorphous argument made by the Warden in this case. However, if Potts was allowed to proceed after dismissing his own prior federal habeas petition (and various next friend applications) and ultimately secure relief from this Court, so must Larry Lonchar.

Conclusion

For the foregoing reasons, Petitioner respectfully requests that this Court deny the Warden's motion to lift the stay of his execution.

This 29th day of June, 1995.

Respectfully submitted,

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CERTIFICATE

I hereby certify that the foregoing pleading has been served on counsel opposite this 29th day of June, 1995.